Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 25, 2019

CLAIM NO. 200689465

CBS CORPORATION PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

GARY SOWDER
DR. ROLANDO PUNO
NORTON LEATHERMAN SPINE CENTER
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING & REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. CBS Corporation ("CBS") seeks review of the June 19, 2019, Opinion and Order resolving a medical fee dispute in favor of Gary Sowder ("Sowder"). In resolving the medical fee dispute filed by CBS, the ALJ determined Sowder had met his burden of proving the January 25, 2019, surgery performed by Dr. Rolando Puno consisting of an interior interbody fusion at L4-5 and L5-S1 is work-

related, and CBS had not met its burden of proving the contested treatment is not reasonable and necessary for the cure and relief of the April 18, 2006, work injury. CBS also appeals from the July 11, 2019, Order overruling its petition for reconsideration.

On appeal, CBS contends the ALJ erred in finding the contested surgery compensable because the evidence supporting a finding of work-relatedness is inadequate.

BACKGROUND

The record reveals Sowder sustained a work-related injury while an employee of CBS on April 18, 2006. The parties executed a Form 110 Agreement as to Compensation approved by Hon. Scott Borders, Administrative Law Judge on March 28, 2008. The Form 110 notes "surgical arthrodesis with instrumented fusion from L2-L4, L3 partial vertebrectomy and strut graft" was performed. The diagnosis was "L3 burst fracture, status post surgical arthrodesis with instrumented fusion from L2-L4, L3 partial vertebrectomy and strut graft." Sowder received a lump sum settlement which included amounts for waiving his right to reopen and right to vocational rehabilitation. Sowder did not waive his right to past and future medical benefits. On January 17, 2019, CBS filed a Motion to Reopen, a Form 112 Medical Fee Dispute, and a Motion to Join Medical Provider- Dr. Puno and Norton Leatherman Spine Center as parties to the action. The Motion to Reopen and Form 112 contested the proposed surgery later performed by Dr. Puno. CBS attached the settlement agreement along with the January 2, 2019, Physician Advisor Report of Dr. Mukund Gundanna. Dr. Gundanna provided the following diagnosis:

> Low Back Pain; at L4-S1 which to provider appears to be associated with Spondylosis. (Please note: the CCM has only accepted levels L2-4 on this claim and there is documentation that there was a settlement on these levels). If the IW has a condition at other levels this does not appear related to the claim at this time and Dr. Puno has not explained how he thinks it may be related in clinical terms.

Dr. Gundanna also provided a summary of Sowder's clinical condition:

> The claimant is a 50-year-old male who was injured on 04/18/06. The mechanism of injury is detailed as when the claimant jumped off a fork lift to avoid a shifting load which caused low back pain. The listed diagnosis is low back pain. Prior treatment had included injections and a prior anterior to posterior fusion from L2 to L4. The 08/01/18 lumbar MRI noted moderate disc bulging at L4-5 and L5-S1 with facet arthropathy which contributed to severe central and moderate neuroforaminal stenosis at both levels. A recent evaluation of the claimant was not provided for review. The last evaluation provided was from September of 2018 which noted continuing low back pain. The submitted request is for L4-5 and L5-S1 anterior to posterior fusion with graft.

Regarding the reasonableness and necessity of the contested surgery, Dr. Gundanna opined as follows:

> The records submitted for review would not support the requested procedures as reasonable or necessary. The claimant's lumbar MRI studies did note evidence of adjacent segment disc disease at L4-5 and L5-S1 which contributed to both central and neuroforaminal stenosis. However, the provided records did not include any documentation regarding recent non-operative measures. Further, there is no recent evaluation of the claimant including an in depth neurological assessment to support proceeding with surgery. Given these issues which do not meet guideline recommendations, this reviewer cannot recommend certification for the requested L4-5 and L5-S1 anterior to posterior fusion with graft. A peer to peer discussion was established and the case was discussed with the provider, Dr. Puno. Per our discussion, there were ongoing L4 and L5 sensory deficits with neurogenic

> claudication. The claimant had a prior L2-4 fusion due to a fracture. Additional records received for review included the previously reviewed MRI studies and a clinical report from July of 2018. There were no more recent clinical reports submitted for review. Therefore, the determination remains unchanged. Because an adverse determination for surgery has been rendered, an adverse determination for any associated pre-operative clearance is also rendered.[1]

By Order dated February 27, 2019, the ALJ found CBS made a *prima facie* showing for reopening. The Motion to Reopen was sustained, Dr. Puno was joined as a party, and a telephonic Benefit Review Conference ("BRC") was scheduled.

On March 15, 2019, Sowder filed the records of Norton Leatherman Spine Center and Dr. Puno.

On April 15, 2019, CBS filed the records review report of Dr. Russell Travis who concluded, in relevant part, as follows:

> Q1: What is your diagnosis of Mr. Sowder regarding the effects of the work injury based on your review of the medical records and other available data?
>
> A1: I have reviewed the medical records carefully on more than one occasion. I have also reviewed the imaging studies several times. Mr. Sowder fell about 15 feet on 4/18/2006 and landed on his feet. This axial load caused a compression fracture of L3. Subsequently, Dr. Puno performed a vertebrectomy of L3 with anterior and posterior interbody fusion at L2-3 and L3-4.
>
> Unfortunately, for Mr. Sowder he has made some improvement but has never been pain free. From review of the medical records it is clear that from the time of the

[1] On March 29, 2019, after the ALJ entered an Order sustaining the Motion to Reopen and joining Dr. Puno as a party, CBS filed this report of Dr. Gundanna in the record.

surgery on 10/10/2006 Mr. Sowder has had continued lumbar pain and has been on Lortab most of that time.

Mr. Sowder has never returned to work since his accident. His Functional Capacity Evaluation performed 9/19/2007 recommended at best a very sedentary type situation. Mr. Sowder filed for disability and has not returned to work. Therefore, he has not had significant stress on his lumbar spine other than with activities of daily living which in his case have been minor.

On 1/22/19 Dr. Puno performed an anterior discectomy and decompression at L4-5 and L5-S1, anterior interbody fusion, posterior instrumentation L4-5 and L5-S1.

The diagnosis for Mr. Sowder's work injury would be compression fracture at L3 with continued low back pain and opioid dependence.

Q2: Is the surgery proposed and possibly performed by Dr. Puno at L4-5, (a) reasonable and necessary for the cure or relief of the effects of the work accident, (b) possibly related to the effect of the work accident? Please explain in detail.

A2: The proposed surgery by Dr. Puno is in no way related to the distant work accident of 4/18/2006. While it is true that Mr. Sowder has developed progressive degenerative changes and spinal stenosis at L4-5 and L5-S1, these changes were present on the initial x-rays on the date of accident. This is a simple progression of the natural aging degenerative changes with no relationship to the L3 vertebral fracture or the fusion performed by Dr. Puno on 10/10/2006.

This is not "adjacent segment degeneration" related to the fusion as some might postulate. Adjacent segment degeneration has been well studied over the years. Dr. Allen Hillebrand published literature in this regard.

…

As noted in the imaging studies, Mr. Sowder's initial imaging studies included MRI of the lumbar spine on 4/18/2006.

Although I was not able to personally review the study the radiology report noted, "Degenerative changes at L4-5. A concentric disk bulge with facet degenerative changes causing moderate canal stenosis. L5-S1 concentric bulge with mild bilateral neural foraminal narrowing. On 4/18/2006 this man already had significant degenerative changes at L4-5 and L5-S1; the levels of which Dr. Puno elected to perform surgery subsequently.

The primary question here is whether the primary fusion L2 to L4 is the cause of the degenerative changes at the adjacent segments of L4-5 and L5-S1. The answer is no. There is no relationship.

…

As to the necessity of the operative procedure by Dr. Puno, it is a reasonable procedure. However, I see no indication for a fusion. Recent literature clearly indicates a simple decompression is appropriate for degenerative problems, without adding a fusion. However, neither decompression nor fusion would be related to the distant injury of 4/18/2006 or the fusion of 10/10/2006. It is simply a progression of natural aging degenerative changes.

I have taken several photographs of the pertinent imaging studies of Mr. Sowder.

Image 1
This is the lumbar spine x-ray of 10/10/2006 prior to the fusion by Dr. Puno. Note that there is already significant disk space narrowing with the posterior osteophyte at L5-S1 as noted by the red arrow. There is significant decreased disk space height.

Image 2
The is an intraoperative photograph from 10/10/2006. Again, note the significant decreased disk space height at L5-S1. The arrow points to a significant osteophyte posterior L5.

Image 3
This is from the lumbar spine x-ray of 12/8/2014. Note this osteophyte posterior L5 has progressed. There is a significant decreased disk space height; an indication of

> progressive degenerative changes over the previous loss of disk space height and osteophyte on the first x-rays of 10/10/2006.
>
> Image 4
> This is from the lumbar spine x-rays of 10/26/2016. Note the osteophyte posterior L5 has significantly enlarged. There is significantly more disk space narrowing, and severe modic changes in the endplates of L5-S1. This is simply progression of the same degenerative changes seen since the x-rays of 10/10/2006. This is simply a progression of the natural aging process.
>
> Q3: Please make any recommendations you believe are appropriate as to any treatment indicated for the effects of the work accident at this time.
>
> A3: I see no indication for any treatment specifically related to the work accident of 2006. As I have noted above, Mr. Sowder's current complaints and the surgery by Dr. Puno have no relationship whatsoever to the distant injury of 4/18/2006.
>
> My only recommendation, which should have been implemented a long time ago, is an active home exercise program and walking program after he has sufficiently recovered from the surgery by Dr. Puno.

On April 23, 2019, Sowder filed copies of a January 31, 2019, letter addressed to Sowder from his attorney, an April 4, 2019, letter addressed to Dr. Puno from Sowder's attorney, and an April 16, 2019, letter from Dr. Puno. Dr. Puno's letter reads as follows:

> I am writing this letter in behalf of Mr. Gary Sowder concerning the medical fee dispute/motion to reopen. As you well know, the above patient sustained a work-related injury on April 18, 2006. His injury included an L3 burst fracture for which he underwent surgical treatment that included an L3 vertebrectomy and spinal fusion from L2-L4. The patient did really well following the surgery and has achieved a solid fusion L2-L4. In the course of time the patient started to develop adjacent level degeneration disc disease at the level of L4-5 and L5-S1 below his spinal fusion which did not respond to

> conservative treatment. He eventually underwent surgery that included anterior inter-body fusion of L4-5 and L5-S1 on January 25, 2019. Based on the history it appears that the surgery in 2006 was related to the work-related injury of April 18, 2006. **The successful solid fusion achieved for the treatment of his burst fracture could have contributed to early development of degenerative disc disease L4-L5 and L5-S1 for which additional surgical intervention had to be performed. (emphasis added).**[2]

On May 16, 2019, CBS filed the May 9, 2019, letter of Dr. Travis which reads, in relevant part, as follows:

> …
>
> Dr. Puno expressed his opinion that Mr. Sowder developed adjacent level degenerative disk disease at L4-5 and L5-S1 below his spinal fusion. Dr. Puno believes his surgery of 2006 was related to the work injury of 4/18/2006 of which I have no question. However, I differ from Dr. Puno's statement; "Successful solid fusion achieved for the treatment of burst fracture could have contributed to early development of degenerative disk disease L4-5 and L5-S1 for which additional surgical intervention had to be performed." (emphasis in original).
>
> As I noted in my report of 3/29/2019, Mr. Sowder made some improvement after the fall. However, he had never been pain free. From a review of the medical records it is clear; from the time of surgery on 10/10/2006 Mr. Sowder continued with lumbar pain and was on Lortab continuously since that time. Mr. Sowder never returned to work after his accident. He applied for disability and did not return to work.
>
> … I gave several examples of evidence-based literature which illustrates that fusion at L4-5 and L5-S1 was not "adjacent segment degeneration" related to the previous fusion L2-L4, but simply the natural aging process. …

[2] The April 16, 2019, letter from Dr. Puno was also filed in the record by the ALJ on April 24, 2019.

> The literature on adjacent segment degeneration has consistently shown that this is not related to an operative procedure but is simply the natural aging process. As I noted when I reviewed the x-rays on Mr. Sowder such as the MRI of 4/18/2006 there were already degenerative changes at L4-5 and L5-S1. The radiology report noted, "Degenerative changes at L4-5. Concentric disk bulge with facet degenerative changes causing moderate canal stenosis. L5-S1 concentric bulge and bilateral neural foraminal narrowing."
>
> On 4/18/2006 Mr. Sowder already had significant degenerative changes at L4-5 and L5-S1. I maintain the opinions I expressed on 3/29/2019.
>
> I will answer the questions posed:
>
> Q1: Does Dr. Travis agree with Dr. Puno's statement that the current fusion "could" be related to the original injury:
>
> A1: My answer remains no.
>
> Q2: Does Dr. Puno's statement constitute a conclusion within reasonable medical probability?
>
> A2: No. In my opinion Dr. Puno's statement is not backed by evidence-based medical literature on the development of adjacent segment degeneration.
>
> Q3: Does Dr. Puno's letter change Dr. Travis' conclusions that he stated in his previous report?
>
> A3: No. My opinion remains the same. After review of a number of imaging studies once again, it remains my opinion that the fusion at L4-5 and L5-S1 was not related to the initial surgery of 4/18/2006 and the compression fracture at L3. This man simply had a progression of the natural aging degenerative change between 2006 and 2014 when Dr. Puno evaluated him again.

The April 22, 2019, BRC Order identified the contested issue as the reasonableness and necessity and/or work-relatedness of the surgery at L4-5 and L5-S1. The time for submitting proof was extended ten days from the date of the Order

with five days thereafter to file briefs. The Order states the parties waived a hearing. Sowder was not deposed. By separate Order dated May 29, 2019, the ALJ ordered the matter submitted as of that date.

In finding the surgery compensable, the ALJ provided the following findings of fact and conclusions of law:

> A telephonic Benefit Review Conference was held on April 22, 2019. Plaintiff and Defendant Employer participated. Pursuant to agreement of the parties, proof was extended for 10 days, followed by 5 additional days for the parties to file briefs. The formal hearing was waived and the matter was submitted on the record for a decision on May 29, 2019.
>
> Defendant Employer introduced the January 2, 2019 Physician Advisor Report of Mukund Gundanna, M.D., who conducted a review of records and noted the 60 year old who injured his back nearly 13 years ago when he jumped from a fork lift causing back pain. Prior treatment included injections and an anterior to posterior fusion from L2 – L4. The August 1, 2018 lumbar MRI noted moderate disc bulging at L4-5 and L5-S1 with facet arthropathy which contributed to severe central and moderate neuroforaminal stenosis at both levels. Dr. Gundanna found the low back pain at L4-S1 appeared to be associated with spondylosis. The compensable claim was at levels L2-4 and other levels would not be related. Therefore, Dr. Gundanna recommended denial of the surgery.
>
> The record includes the settlement agreement approved on April 10, 2008. Dr. Barefoot had assigned 34% whole person impairment and Dr. Tutt, on behalf of Defendant, assigned 22% impairment. He found that the work injury led to the fusion surgery and that he had a good result.
>
> On behalf of Defendant Employer, Russell Travis, M.D., conducted a review of medical records and diagnostic imaging dating back to Plaintiff's injury and original fusion surgery. He provided a thorough summary of the records he reviewed. He described the 2006 work injury where Plaintiff fell about 15 feet and landed on his

feet. This axial load caused a compression fracture at L3. Subsequently, Dr. Puno performed the vertebrectomy of L3 with anterior and posterior interbody fusion at L2-3 and L3-4. He has made some improvement but has never been pain free. Since the time of the surgery he has had continued lumbar pain and has been on Lortab most of the time. He has never returned to work and the 2007 FCE recommended nothing more than very sedentary activity. He is on disability and would not have had significant stress on his lumbar spine. Dr. Travis diagnosed compression fracture at L3 with continued low back pain and opioid dependence. He concluded that the extension of Plaintiff's fusion by Dr. Puno was in no way related to his prior fusion or the work injury. The progressive degenerative changes and spinal stenosis at L4-5 and L5-S1 were present on the initial x-rays on the date of the accident. It relates to natural aging and has no relation to the work injury. Dr. Travis stated that the surgery, while possibly reasonable, was not medically necessary. He stated that the treatment could have been accomplished by decompression instead of a fusion. His only recommendation would be an active home exercise program with walking after his recovery from surgery. In a May 9, 2019 addendum report, after reviewing the letter from Dr. Puno, Dr. Travis stated nothing in the letter changed his earlier opinion that the fusion is not causally related to the effects of the original work injury.

On behalf of Plaintiff, Dr. Puno provided his opinion in a letter dated April 16, 2019 where he noted at the outset the 2006 work injury that included an L3 burst fracture and resulted in an L3 vertebrectomy and spinal fusion from L2-L4. The surgery was a success as the fusion was solid. Over time, Plaintiff began to develop adjacent level degenerative disc disease at L4-5 and L5-S1 below the fusion which did not respond well to treatment. On January 25, 2019, Dr. Puno conducted an anterior inter-body fusion of L4-5 and L5-S1. Regarding causation, Dr. Puno stated:

> Based on the history it appears that the surgery in 2006 was related to the work-related injury of April 18, 2006. The successful solid fusion achieved for the treatment of his burst fracture could have contributed to early development of

> degenerative disc disease L4-5 and L5-S1 for which additional surgical intervention had to be performed.

In a post judgment Motion to Reopen to Assert a Medical Dispute, Defendant Employer has the burden of proving that the contested medical expenses and/or proposed medical procedure is unreasonable or unnecessary, while Plaintiff maintains the burden of proving that the contested medical expenses and/or proposed medical procedure is causally related treatment for the effects of the work-related injury. *Mitee Enterprises vs. Yates*, 865 SW2d 654 (KY 1993) *Square D Company vs. Tipton*, 862 SW2d 308 (KY 1993) *Addington Resources, Inc. vs. Perkins*, 947 SW2d 42 (KY App. 1997). In addition, the legislature's use of the conjunctive "and" which appears in subsection 1 of KRS 342.020 "cure and relief" was intended to be construed as "cure and/or relief". *National Pizza Company vs. Curry*, 802 SW2d 949 (KY 1991).

In the dispute herein, Defendant Employer has challenged reasonableness, necessity and work relatedness of fusion surgery at L4-5 and L5-S1. The opinions of Dr. Travis and Dr. Gundanna have been considered and while compelling, are not persuasive on the issue. The evidence is uncontroverted that the original surgery was the result of the work injury and was a reasonable and necessary treatment. While the medical opinions differ, the opinion of Dr. Puno is persuasive that the successful solid fusion achieved for the treatment of his burst fracture could have contributed to early development of degenerative disc disease L4-5 and L5-S1 for which additional surgical intervention had to be performed. While an argument could be made that Dr. Puno's words "could have contributed" are weak when addressing causation, his opinion is interpreted as saying the surgery relates to the original injury. Using of the words "had to be performed," Dr. Puno opines the treatment was reasonable and necessary. Dr. Travis' recommendation for alternative treatment is not persuasive for the proposition that the treatment rendered was not reasonable and necessary. The medical evidence is persuasive that Plaintiff underwent fusion for the original injury and has now had a [sic] additional surgery to address adjacent level degeneration related to the original injury and surgery. Plaintiff has met the burden

> of proving work relatedness and Defendant Employer has not met its burden of proving the contested treatment is not reasonable and necessary for the cure and/or relief of the work injury. The surgery is compensable.

CBS filed a petition for reconsideration noting Dr. Puno had simply stated Sowder's "contested surgery 'could' be related to his original injury or the earlier treatment of that injury." CBS contended this is insufficient medical proof to support a finding the treatment is compensable. It argued the ALJ was compelled to find the "surgery and associated treatment non-compensable."

In the July 11, 2019, Order overruling the petition for reconsideration, the ALJ concluded as follows:

> Plaintiff has responded and has set out his argument such that it clearly addresses the issue:
>
> > The Employer's Petition for Reconsideration claims that the Claimant did not introduce medical evidence within reasonable medial probability of a relationship between the most recent surgery and the work-related injury. Dr. Puno stated that the contested surgery could be related to his original injury or the earlier treatment of that injury. The Claimant does not understand the Employer's difficulty with the use of the word "could." If Dr. Puno wanted the ALJ to believe it was not related, he would have said it could not be related or was not related. Instead, he said it could be related. In addition, this statement was not made in a vacuum. By letter of January 31, 2019 to the Claimant, Mr. Sowder was directed to take a copy of the papers he received in the mail to Dr. Puno, (although he should have already received a copy). Gary was asked to discuss Dr. Puno preparing a letter/report outlining why the treatment that he was recommending, the L4-5, L5-

> S1 anterior posterior fusion with graft was reasonable and necessary for treatment of the work injury. He was asked to be specific as to what the treatment was used for as it relates to the injury and symptoms. He was further asked to share the January 31, 2019 letter with Dr. Puno and in fact it was suggested he take the letter with him and advise Dr. Puno if he had additional questions to contact Claimant's counsel directly.
>
> That letter was attached with the notice of submission of the medical report and the April 16, 2019 letter from Dr. Puno was addressed to Claimant's counsel. There can be absolutely no question that the doctor knew what he was asked and what he was answering. Even a cursory review of the letter stands for the proposition that the doctor felt the surgery was reasonable, necessary and related to the work injury and he was not of the opposite opinion.

CBS challenges the evidence relied upon by the ALJ asserting it is insufficient to support a finding the contested surgery is work-related. It argues, as it did in its petition for reconsideration, that Dr. Puno's single statement is offered in terms of possibility and not probability and comprises "insufficient proof." It observes the 2019 surgery was performed at a level of the lumbar spine different than the area of the spine affected by the work injury. It maintains Dr. Puno was given ample opportunity to provide a direct opinion as to causation, but was only able to state the surgery could be related to the injury which is insufficient to support the ALJ's decision.

CBS notes that, when causation is not readily apparent to a layperson, medical proof is required. Thus, the medical proof must consist of a medical opinion

couched in terms of reasonable medical probability and not merely the possibility of a causal relationship. CBS posits that, as correctly stated by the ALJ, Dr. Puno knew the question to be answered. However, instead of associating the new surgery with the injury or an earlier operation, Dr. Puno only opined the surgery "could" be related which does not constitute proof within reasonable medical probability.

CBS argues this case is controlled by Kingery v. Sumitomo Electric Wiring, 481 S.W.3d 492 (Ky. 2015). CBS interprets Kingery, supra, as reiterating the fact that claimant has the continuing burden to produce medical evidence to support a finding of compensability in a post-award medical dispute. Consequently, the ALJ cannot award medical benefits based on her "'sixth sense', feeling or intuition." Since there is insufficient evidence to support the ALJ's finding of compensability, CBS seeks reversal of the ALJ's finding of compensability and remand with directions the ALJ find the contested surgery non-compensable.

ANALYSIS

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness of medical treatment falls on the employer. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). However, the burden remains with the claimant concerning questions of work-relatedness or causation of the condition. Id; *see also* Addington Resources, Inc. vs. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

However, we are mindful of the Kentucky Supreme Court's holding in C & T of Hazard v. Stollings, 2012-SC-000834-WC, rendered October 24, 2013, Designated Not To Be Published, that the burden is placed on the party moving to

reopen because it is that party who is attempting to overturn a final award of workers' compensation and must present facts and reasons to support that party's position:

> The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable. *Crawford & Co. v. Wright,* 284 S.W.3d 136, 140 (Ky. 2009) (citing *Mitee Enterprises v. Yates,* 865 S.W.2d 654 (Ky. 1993) (holding that the burden of contesting a post-award medical expense in a timely manner and proving that it is non-compensable is on the employer)). As stated in *Larson's Workers' Compensation Law,* § 131.03[3][c], "the burden of proof of showing a change in condition is normally on the party, whether claimant or employer, asserting the change ...." The burden is placed on the party moving to reopen because it is that party who is attempting to overturn a final award of workers' compensation and thus must present facts and reasons to support that party's position. It is not the responsibility of the party who is defending the original award to make the case for the party attacking it. Instead, the party who is defending the original award must only present evidence to rebut the other party's arguments.
>
> . . .
>
> Thus, C & T had the burden of proof to show that Stolling's treatment was unreasonable and not work-related.

Slip Op. at 4-5.

The question on appeal is whether the ALJ's finding concerning causation is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly,

the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be drawn therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary parties' total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

In order to reverse the decision of the ALJ it must be shown that there is no evidence of substantial or probative value to support her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). In other words, on appeal CBS must prove that the ALJ's findings are unreasonable and, thus, clearly erroneous, in light of the evidence in the record. Special Fund v. Francis, supra.

The sole issue is whether the April 16, 2019, letter of Dr. Puno constitutes substantial evidence supporting the ALJ's finding regarding causation. For the foregoing reasons, we conclude Dr. Puno's letter, standing alone, does not constitute substantial evidence supporting the ALJ's determination the surgery is causally related to the April 18, 2006, work injury. The ALJ found persuasive Dr. Puno's opinion "the successful solid fusion achieved for the treatment of his burst fracture could have contributed to early development of degenerative disc disease L4-5 and L5-S1 for which additional surgical intervention had to be performed." In accepting Dr. Puno's letter, the ALJ acknowledged an argument could be made that Dr. Puno's words "could have contributed" are weak when addressing causation.

Nonetheless, she interpreted those words to mean the January 25, 2019, surgery relates to the original injury. The ALJ did not provide an explanation for her determination other than to state the evidence is persuasive that the additional surgery was performed "to address adjacent level degeneration related to the original injury and surgery." Moreover, the ALJ did not cite to any other medical evidence as support for her finding regarding causation. The ALJ was not able to rely, in part, upon lay testimony as Sowder was not deposed and the parties waived the hearing.

In the April 16, 2019, letter, Dr. Puno stated that, in the course of time, Sowder started to develop adjacent level disc disease at L4-5 and L5-S1 below the spinal fusion site which did not respond to conservative treatment. He did not attribute the adjacent level degenerative disc disease to the work injury and/or the 2006 surgery. Dr. Puno stated that, based on the history, the 2006 surgery was related to the work injury of April 18, 2006. However, he did not offer a similar opinion regarding the 2019 surgery by attributing it to the April 18, 2006, injury. He also did not affirmatively state the previous fusion surgery probably contributed or did contribute to the current condition necessitating the need for the January 25, 2019, surgery. Rather, he merely stated the treatment of the burst fracture in the form of solid fusion surgery *could have contributed* to the early development of degenerative disc disease at L4-5 and L5-S1 necessitating the 2019 surgery. He did not explain how the 2006 surgery could have necessitated the January 25, 2019, surgery. Dr. Puno's statement does not constitute an opinion offered in terms of reasonable medical probability. In offering his opinion, Dr. Puno was not required to use the magic phrase "in terms of reasonable medical

probability." However, his opinion was not founded on probability but, rather, on possibility.

Sowder's assertions as to what Dr. Puno knew prior to formulating his April 16, 2019, letter, as set forth in his response to CBS' petition for reconsideration and adopted by the ALJ in the Order overruling the petition for reconsideration, cuts both ways. If we assume Dr. Puno clearly knew the specific opinion requested by Sowder, his January 31, 2019, letter falls short of supplying the opinion Sowder sought. Dr. Puno merely opined that the previous solid fusion surgery could have contributed to the condition necessitating the additional surgery.

In Lexington Cartage Co. v. Williams, 407 S.W.2d 395, 396 (Ky. App. 1966), the Kentucky Court of Appeals noted as follows:

> In *Grimes v. Goodlett and Adams*, Ky., 345 S.W.2d 47, we recognized that expert medical witnesses often find it impossible to state a medical cause of a disability with absolute certainty. We concluded that *** The facts or hypothesis on which the professional witness testifies need not be conclusive. They are sufficient if in his opinion they indicate the cause within reasonable probability.' See also *Lewis v. United States Steel Corp.*, Ky., 398 S.W.2d 490.

In the case *sub judice*, Dr. Puno did not offer an opinion based on probability.

In Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165, 168 (Ky. App. 1980) regarding the issue of whether a heart attack was work-related, the Court of Appeals held as follows:

> If the positions were reversed and Dr. Olash and Dr. Handley had testified based on their medical expertise that appellant's job-related physical exertion was the likely and probable cause of his heart attack and only Dr.

> Lewis had disagreed, we doubt very seriously if the Board would, or could as reasonable persons, have rejected the former opinions in favor of the latter. But taking the objective medical evidence, i. e., the unquestioned medical diagnosis discussed earlier in conjunction with the internist's and cardiologist's opinions, the only reasonable conclusion to be reached is that appellant's heart attack was caused by his coronary artery disease and not the conditions under which he worked.
>
> This case, perhaps, presents an example of the Board being overzealous in liberally construing the Workmen's Compensation Act. The rule of liberal construction does not extend to evidentiary matters. KRS 342.004. The question of work-relatedness in this case was fundamentally an evidentiary one. At most, only a possibility that appellant's heart attack arose out of his employment was established. A mere possibility is not alone sufficient to support the Board's findings of fact. *Terry v. Associated Stone Co.*, Ky., 334 S.W.2d 926 (1960); *Seaton v. Rosenberg*, Ky., 573 S.W.2d 333, 338 (1978).

As in Pierce, supra, Dr. Puno's opinion that the surgery performed for the treatment of the burst fracture could have contributed to the early development of the degenerative disc disease at a different level for which surgical intervention was required is insufficient to establish a medically sufficient causal connection between the 2019 surgery and the work-related injury occurring approximately thirteen years earlier.

Finally, the following language in Combs v. Stortz, 276 S.W.3d 282, 296 (Ky. App. 2009) accurately describes the problem with the ALJ's reliance upon Dr. Puno's use of the language "could have contributed" in finding the surgery causally related to the April 18, 2006 injury:

> Dr. Grefer, who was one of Combs' treating physicians, testified as to his opinion that Combs *might possibly require* neck and/or shoulder surgery. He also provided an estimation of the costs of those operations. That

> testimony was ultimately excluded by the trial court as being speculative. Combs argues that Dr. Grefer's testimony should have been allowed in its entirety. We disagree.
>
> In *Seaton v. Rosenberg,* 573 S.W.2d 333 (Ky.1978), an issue arose as to the admissibility of physician testimony. Ultimately, the Court decided to admit the testimony, finding it important to note, "[o]ne last caution, the expert expresses his opinion as a probability or certainty, not a possibility, 'could have,' or the like." *Id.* at 338. Likewise, in the workers' compensation matter of *Young v. L.A. Davidson Inc.,* 463 S.W.2d 924 (Ky.1971), the Kentucky Supreme Court held that in a workers' compensation proceeding, "medical-opinion evidence [must] be founded on probability and not on mere possibility or speculation...." *Id.* at 926. In the instant matter, Dr. Grefer couched his opinion *not* in terms of probability or certainty, but indeed as *possibility.*[3]

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[3] In light of the citation to Seaton v. Rosenberg, 573 S.W.2d 333, 338 (Ky. 1978), we are compelled to point out that in Turner v. Com., 5 S.W.3d 119, 122-123 (Ky. 1999) regarding its holding in Seaton, the Kentucky Supreme Court explained:

> Appellant complains that Dr. Levy did not state his opinion in terms of reasonable probability as seemingly required by a cautionary note in *Seaton v. Rosenberg,* Ky., 573 S.W.2d 333, 338 (1978), *viz:* "One last caution, the expert expresses his opinion as a probability or certainty, not a possibility, 'could have,' or the like." However:
>
> The cautionary note in *Seaton v. Rosenberg* was *dictum* at best. The seminal case on this issue, *Rogers v. Sullivan,* Ky., 410 S.W.2d 624 (1966), does not require an expert medical witness to use the magic words "reasonable probability." *Rogers* only holds that testimony so phrased satisfies the requirement that an issue requiring medical expertise be proven by "the positive and satisfactory type of evidence required to take the case to the jury on that question." *Id.* at 628. In other words, the requirement of "reasonable probability" relates to the proponent's burden of proof, not to the admissibility of the testimony of a particular witness. [footnote omitted]

However, in concluding the trial Court correctly permitted the opinion testimony of a doctor, the Supreme Court stated:

> 2. Even if the requirement of "reasonable probability" were a rule of evidence rather than a standard of proof, *i.e.,* an expert opinion would not "assist the trier of fact" as required by KRE 702 unless expressed in those terms, the rules of evidence do not apply to a ruling on the admissibility of evidence. KRE 104(a).

> While we are not compelled to follow the decisions of courts in other circuits, we believe in this instance that the reasoning in *Schulz v. Celotex Corp.,* 942 F.2d 204 (3rd Cir.1991), is sound and serves to further expound upon what we believe is the reasoning behind the aforementioned decisions. That case reads, in pertinent part:
>
> > Situations in which the failure to qualify the opinion have resulted in exclusion are typically those in which the expert testimony is speculative, using such language as "possibility."
> >
> > …
> >
> > Accordingly, while the particular phrase used should not be dispositive, it may indicate the level of confidence the expert has in the expressed opinion. Perhaps nothing is absolutely certain in the field of medicine, but the intent of the law is that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision. *McMahon v. Young,* 442 Pa. 484, 276 A.2d 534, 535 (1971).
>
> *Schulz,* 942 F.2d at 208–209. We believe this reasoning rings true for the matter *sub judice.* Dr. Grefer's testimony was couched in terms of possibility, in contrast to probability or certainty. We decline to overrule the trial court in finding his testimony inadmissible.

Here, Dr. Puno's statement, at best, can only be interpreted as there exists a possibility the fusion surgery performed in 2006, at a different level, contributed to the need for fusion surgery performed at L4-5 and L5-S1 on January 25,

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3. Dr. Levy testified that he had an opinion which was based upon reasonable medical probability and that his opinion was that it was more likely than not that a person with Bill Turner's injuries would have believed that his death was imminent. His testimony was not expressed in terms of "a possibility, 'could have,' or the like," as cautioned against in *Seaton v. Rosenberg, supra.*

2019. Consequently, Dr. Puno's April 16, 2019, letter does not comprise substantial evidence supporting the ALJ's finding regarding causation.

That said, we stop short of reversing and remanding with directions to find the January 25, 2019, surgery is non-compensable and to enter of a decision relieving CBS of the liability for that surgery. The ALJ relied upon Dr. Puno's letter and found persuasive his one statement indicating, "the successful solid fusion achieved could have contributed to early development of degenerative disc disease at L4-L5 and L5-S1 for which additional surgical intervention had to be performed." That conclusory statement is insufficient to support a finding concerning causation. Thus, the claim must be remanded to the ALJ to re-examine the medical evidence in the record and determine whether substantial evidence supports a finding the 2019 surgery is causally related to the April 18, 2006, work injury. If, on remand, the ALJ is unable to find medical evidence which supports such a finding, the ALJ must find the surgery non-compensable.

In the case *sub judice*, the issue of causation must be based solely upon the medical evidence. When the cause of a condition is not readily apparent to a lay person, medical testimony supporting causation is required. Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Co. v. Williams, supra. The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., supra.

Accordingly, the ALJ's determination the January 25, 2019, surgery is causally related to the work injury as set forth in the June 19, 2018, Opinion and Order

and the July 11, 2019, Order overruling the petition for reconsideration is **VACATED**. This claim is **REMANDED** to the ALJ for entry of an opinion in accordance with the views expressed herein.

ALL CONCUR.

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